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Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)-1658–07 OF 2012
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
28 FEBRUARY 2014

Companies and Corporations — Liquidation — Right to commence action — Application for leave to initiate action against wound up company — Criteria for granting leave — Whether application for leave to be made through winding up court or through independent proceeding — Claim premised on specific performance of sale and purchase agreement — Whether leave should be granted — Whether prima facie case established — Companies Act 1965 s 226(3)

Words and Phrases — 'Prima facie' — Meaning of — Companies Act 1965 s 226(3)

The respondent was wound up and Danaharta Urus Sdn Bhd ('Danaharta') acquired the rights, title and interest of Bumiputra-Commerce Bank Bhd ('BCCB') in the security documents relating to the credit facilities extended by BCCB to the respondent over certain charged properties. A settlement agreement was entered into to facilitate a sale and purchase agreement ('the SPA') between Danaharta, the respondent and the appellant in which the appellant agreed to purchase 121 lots of land in an abandoned housing project belonging to the respondent. A deposit was paid by the appellant to Danaharta. The respondent applied to the court and obtained sanction for the SPA. The appellant failed to pay the balance purchase before the completion date. Two extensions of the completion date was granted on condition that a sum of RM100,000 was to be paid as consideration for the extensions. No payment was made and the respondent terminated the SPA. Subsequent to the termination, the respondent sold 90 of the 121 lots of land. Upon becoming aware of the sale to the 90 lots of land, the appellant commenced legal action against the respondent and Danaharta. The suit was struck off on the ground that no leave had been obtained by the appellant pursuant to s 226(3) of the Companies Act 1965 ('the Act'). The appellant then filed an originating summons ('Suit 217') against the respondent, seeking leave under s 226(3) of the Act to initiate action against the respondent in respect of the SPA. The respondent objected to Suit 217 on the ground the appellant should have filed an application for leave under s 226(3) in the winding up court and not through an independent proceeding. The appellant thus discontinued Suit 217 and filed the present application for leave to intervene and leave under s 226(3)

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of the Act to commence legal action against the respondent. The appellant's claim was premised on the relief of specific performance of the SPA. The High Court rejected the appellant's application and hence, the present appeal. The issue to be determined was whether leave should be granted to the appellant pursuant to s 226(3) of the Act.

Held, allowing the appeal with costs of RM10,000:

(1) Under s 226(3) of the Act, before leave is granted, the appellant had the burden of satisfying the court of two criteria: (a) that the appellant's claim could not be adequately dealt with by the winding up court; and (b) that the appellant had a prima facie case against the respondent (see para 24).

(2) There was little doubt that the appellant's claim of specific performance could not be dealt with by the winding up court in that its claim was unlike say a proof of debt. In short it was not a monetary claim (see para 24).

(3) As to what amounts to prima facie in the context of s 226(3) of the Act, it is simply whether there is a serious dispute between the litigants which warrant a trial to determine the truth of the combating allegations. It is not unlike the court's approach when dealing with an application to strike out under O 18 r 19 of the Rules of Court 2012 despite the consideration that the liquidator ought not to be burden with wasteful financial resources in defending frivolous legal actions (see para 27).

(4) The appellant's main complaint was the unilateral imposition of RM100,0000 for the extension of time to pay the balance purchase price. This complaint gave rise to the question as to whether the respondent was entitled to impose the RM100,000 contractually or otherwise. This question was a serious dispute between the appellant and the respondent. That question prima facie raised a reasonable cause of action and not to give the appellant the chance to argue that the unilateral imposition of the RM100,000 was unlawful would be contrary to the basic right of the appellant of having its day in court. Not granting leave amounted to shutting out the appellant and it is a drastic action which the courts should be slow to use (see paras 28–29).

(5) Further, this was a claim not for monetary returns but one of specific performance of an agreement entered pursuant to a settlement agreement. The appellant's claim of specific performance was not frivolous and baseless claim. Neither was it a futile claim in that it was bound to fail. Whether it failed or not should be determined by the courts (see paras 30 & 32).

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[Bahasa Malaysia summary

Responden telah digulungkan dan Danaharta Urus Sdn Bhd ('Danaharta') memperolehi hak, hak milik dan kepetingan Bumiputra-Commerce Bank Bhd ('BCCB') dalam dokumen-dokumen cagaran berkaitan kemudahan kredit yang diberikan oleh BCCB kepada responden berhubung hartanah tertentu yang dicagarkan. Satu perjanjian penyelesaian telah dimasuki untuk memudahkan perjanjian jual beli ('PJB') antara Danaharta, responden dan perayu di mana perayu bersetuju untuk membeli 121 lot-lot tanah projek perumahan terbengkalai milik responden. Deposit telah dibayar oleh perayu kepada Danaharta. Responden memohon kepada mahkamah dan telah memperoleh sanksi untuk PJB. Perayu telah gagal membayar baki belian sebelum tarikh siap. Dua lanjutan tarikh siap telah diberikan dengan syarat sejumlah RM100,000 perlu dibayar sebagai balasan untuk lanjutan-lanjutan tersebut. Tiada bayaran telah dibuat dan responden telah menamatkan PJB itu. Berikutan penamatan itu, responden telah menjual 90 daripada 121 lot-lot tanah tersebut. Setelah menyedari jualan 90 lot-lot tanah tersebut, perayu telah memulakan tindakan undang-undang terhadap responden dan Danaharta. Guaman telah dibatalkan atas alasan tiada kebenaran telah diperolehi oleh perayu menurut s 226(3) Akta Syarikat 1965 ('Akta tersebut'). Perayu kemudiannya telah memfailkan saman pemula ('Guaman 217') terhadap responden, memohon kebenaran di bawah s 226(3) Akta tersebut untuk memulakan tindakan terhadap responden berkaitan PJB itu. Responden membantah terhadap Guaman 217 atas alasan perayu patut memfailkan permohonan untuk kebenaran di bawah s 226(3) di mahkamah penggulungan dan bukan melalui prosiding berasingan. Perayu dengan itu menghentikan Guaman 217 dan memfailkan permohonan ini untuk kebenaran campur tangan dan kebenaran di bawah s 226(3) Akta tersebut untuk memulakan tindakan undang-undang terhadap responden. Tuntutan perayu berasaskan relief pelaksanaan spesifik PJB. Mahkamah Tinggi telah menolak permohonan perayu dan justeru, rayuan ini. Isu untuk ditentukan adalah sama ada kebenaran patut diberikan kepada perayu menurut s 226(3) Akta tersebut.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Di bawah s 226(3) Akta tersebut, sebelum kebenaran diberikan, perayu mempunyai beban memenuhi dua kriteria kepada mahkamah: (a) bahawa tuntutan perayu tidak boleh dikendalikan sewajarnya oleh mahkamah penggulungan; dan (b) bahawa perayu mempunyai kes prima facie terhadap responden (lihat perenggan 24).

(2) Terdapat sedikit keraguan bahawa tuntutan perayu untuk pelaksanaan spesifik tidak boleh dikendalikan oleh mahkamah penggulungan kerana tuntutannya tidak seperti bukti untuk hutang. Pendek kata ia bukan tuntutan kewangan (lihat perenggan 24).

(3) Tentang apa yang dianggap prima facie dalam konteks s 226(3) Akta

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tersebut, ia semata-mata adalah sama ada terdapat pertikaian serius antara litigan-litigan yang mewajarkan perbicaraan untuk menentukan kebenaran menangani dakwaan itu. Ia tidak seperti pendekatan mahkamah apabila menangani permohonan untuk pembatalan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 meskipun balasan bahawa penyelesai tidak patut dibebankan dengan sumber kewangan yang membazir dalam membela tindakan undang-undang yang remeh (lihat perenggan 27).

(4) Aduan utama perayu adalah pengenaan satu pihak berjumlah RM100,000 untuk lanjutan masa membayar baki harga belian. Aduan ini menimbulkan persoalan sama ada responden berhak mengenakan RM100,000 secara kontraktual atau sebaliknya. Persoalan ini adalah pertikaian serius antara perayu dan responden. Persoalan prima facie itu menimbulkan kausa tindakan yang munasabah dan dengan tidak memberikan peluang kepada perayu untuk berhujah bahawa pengenaan satu pihak berjumlah RM100,000 adalah menyalahi undang-undang yang mana bertentangan dengan hak asasi perayu untuk mendapat perbicaraan sehari. Dengan tidak memberikan kebenaran sama seperti mengetepikan perayu dan ia adalah tindakan drastik yang mahkamah patut difikirkan wajar untuk tidak memberikannya (lihat perenggan 28–29).

(5) Selanjutnya, ini bukan tuntutan untuk pulangan wang tetapi untuk pelaksanaan spesifik perjanjian yang dimasuki berikutan dengan perjanjian penyelesaian. Tuntutan pelaksanaan spesifik perayu bukan tuntutan yang remeh dan tidak berasas. Ia juga bukan tuntutan yang sia-sia kerana dianggap akan gagal. Sama ada ia gagal atau tidak patut ditentukan oleh mahkamah (lihat perenggan 30 & 32).]

Cases referred to

Bruno Phillipe Fehrenbach v Pegawai Penerima, Malaysia (selaku pelikuidasi Han Pacific Sdn Bhd) [1999] 5 MLJ 321; [1999] 6 CLJ 177, HC (refd)

Capita Financial Group Ltd v Rothwells Ltd (No 2) (1989) 7 ACLC 634, SC (refd)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yacoob & Ors and connected cases [1983] 2 MLJ 227; [1983] CLJ (Rep) 165, FC (refd)

Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd [2008] 5 MLJ 191; [2008] 3 CLJ 582, CA (refd)

Vagrand Pty Ltd (in liq) v Fielding CTH (1993) 11 ACLC 411, FC (refd)

Legislation referred to

Companies Act 1965 s 226(3)
Limitation Act 1953 s 6(1)(a)
Rules of Court 2012 O 18 r 19
Rules of the High Court 1980 O 18 r 19

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Appeal from: Petition No 28(42)–75 of 1987 (High Court, Johor Bahru)

Bastian Vendargon (MR Kumar and RS Pani with him) (Kumar Associates) for the appellant.
David Mathews (R Thipajothi with him) (Mathews Hun Lachimanan) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge dismissed an application by the appellant for leave to intervene and commence an action against the respondent under s 226(3) of the Companies Act 1965.

[2] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[3] The respondent was wound up on 27 February 1989 and pursuant to an acquisition agreement dated 6 May 1999, Danaharta Urus Sdn Bhd ('Danaharta') acquired the rights, title and interest of Bumiputra-Commerce Bank Bhd ('BCCB') in the security documents relating to the credit facilities extended by BCCB to the respondent over the charged properties.

[4] In view of the discovery of the existence of an uncompleted and abandoned housing project belonging to the respondent, a settlement agreement was entered into on 18 January 2005 in respect of 121 lots of land in the abandoned housing project.

[5] The parties to that settlement agreement are Danaharta, BCCB as borrower, Segamat Kinisayang Supermarket Sdn Bhd and Sri Andil Trading & Development Sdn Bhd and the appellant. The purpose of that settlement agreement is to facilitate a sale and purchase agreement between Danaharta, the respondent and the appellant in which the appellant agreed to purchase the 121 lots of land for a consideration of RM3.5m subject to terms and conditions in the sale and purchase agreement.

[6] A sum of RM350,000 being deposit of 10% of the consideration was paid by the appellant to Danaharta leaving a balance of RM3,150,000. To formalise the sale and purchase agreement, application was made to the court

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by the respondent to sanction the sale and purchase agreement. Such sanction or consent was obtained from the High Court on 22 March 2005.

[7] However there were some typographic mistakes in the extracted court order resulting an application to the court by the respondent to amend the order. The amended court order was finally obtained on 24 October 2005.

[8] The balance purchase price was to be paid on or before 5 September 2005 as per cl 2.3 of the sale and purchase agreement ('completion date'). No payment was made by the appellant on that date. Be that as it may, two extensions of the completion date was granted by the respondent and Danaharta and they were 20 May 2006 and 12 June 2006 on the condition that a sum of RM100,000 is to be paid by the respondent as consideration for the two extensions.

[9] No payment was made by the respondent on or before 12 June 2006, the result of which is that the respondent terminated the sale and purchase agreement through a letter dated 12 June 2006 issued by its solicitors.

[10] Subsequent to the aforesaid termination, the respondent on 24 December 2007 sold 90 of the 121 lots of land to Merit Shine Sdn Bhd. Full purchase price of the 90 lots of land had been paid in full to Danaharta through a wholly owned subsidiary of the Ministry of Finance, namely, Prokhas Sdn Bhd.

[11] Upon becoming aware of the sale to the 90 lots of land, the appellant commenced legal action in Johor Bahru against the respondent and Danaharta on 14 November 2008 via MT5-22–852 of 2008 ('Suit 852'). The respondent applied to strike out the appellant's statement of claim under O 18 r 19 of the RHC on the ground that no leave had been obtained by the appellant pursuant to s 226(3) of the Companies Act 1965. That application was sustained resulting in the suit being struck out on 21 October 2010.

[12] As a result of Suit 852 being struck out, the appellant filed an Originating Summons No 24M-217 of 2010 ('Suit 217') naming the respondent as the defendant, seeking leave under s 226(3) of the Companies Act 1965 to initiate action against the respondent in respect of the sale and purchase agreement.

[13] The respondent then took objection to Suit 217 on the substantive ground the application therein should have filed an application for leave under s 226(3) in this winding up court and not through an independent proceeding. Upon being aware of this objection and after taking legal advice, the appellant discontinued Suit 217 without the consent of the respondent which naturally

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ignited protest from the respondent demanding that costs be given to it.

[14] After the discontinuance of Suit 217, the appellant filed this notice of motion under the petition 28(42)–75 of 1987 for leave to intervene in the aforesaid petition and be given leave under s 226(3) of the Companies Act 1965 to commence legal action against the respondent.

[15] The appellant's application for leave was objected to by the respondent. During the pendency of the proceedings, the appellant was wound up by Kuantan High Court on 4 November 2011. However the application was continued by the private liquidator appointed for the appellant. The substantive grounds for this application are these. The appellant's claim is premised on the relief of specific performance of the sale and purchase agreement. It is also claimed that damages will not be an adequate remedy and the balance of convenience favours the appellant in that it had paid substantial money pursuant the sale and purchase agreement. Finally the appellant at all material time is able and willing to complete to the sale and purchase agreement in respect of the purchase of the 121 lots of land.

[16] The Johor Bahru High Court however rejected the appellant's application and it is this decision which we are concerned with in this appeal.

OUR GROUNDS OF DECISION

[17] The only substantive issue before us is whether leave should be granted to the appellant pursuant to s 226(3) of the Companies Act 1965 which reads as follows:

> when a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
>
> (a) by leave of the Court
>
> (b) in accordance with such terms as the Court imposes.

[18] To recap, the appellant's claim is one of specific performance against the respondent in respect of the sale and purchase agreement of the 121 lots of lands dated 18 January 2005.

[19] Before we deal with the respondent's submission we wish to state what the legal position is as far as what is the threshold test envisaged in s 226(3) of the Companies Act 1965 before leave is granted.

[20] In *Bruno Phillipe Fehrenbach v Pegawai Penerima, Malaysia (selaku pelikuidasi Han Pacific Sdn Bhd)* [1999] 5 MLJ 321; [1999] 6 CLJ 177 Abdul

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Malik Ishak J held as follows:

> In the context of our s 226(3) of the Companies Act 1965, leave would readily be given by the court if all the requirements are fulfilled. It is a correct statement of the law to say and I so say that the court considers whether leave to proceed should be granted by looking at the nature of the plaintiff's claim, the balance of convenience and the justice of the case (*Re Gordon Grant & Grant Pty Ltd; Re Stuart Bros Pty Ltd* (1995) 16 ACSR 451; and *Speiser v Locums Financial Management Pty Ltd* [1997] 22 ACSR 478 [15 ACLC 278] (SC NSW)). Thus, in a situation where it is unlikely that the plaintiff will obtain any advantage over the creditors and that no prejudice will be caused either to the creditors or to the orderly winding up of the company, leave will be granted as a matter of course (*Re Gordon Grant & Grant Pty Ltd; and Ex p Walker* (1982) 6 ACLR 423). The court in *Re Coastal Constructions Pty Ltd (In Liquidation)* (1994) 13 ACSR 329 in determining whether leave to proceed should be granted was of the view that there was a necessity to examine the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and, lastly, the stage which the proceedings have reached. It must not be forgotten that the applicant too must establish that he or she has a prima facie case meaning that the applicant must show that there is a real dispute between the parties (*Zempilas v JN Taylor Holdings Ltd (In Prov Liq)* (1991) 3 ACSR 755 (SC SA); and *Vagrand Pty Ltd (In Liq) v Fielding* (1993) 41 FCR 550 [113 ALR 128]). All these are factual situations where the courts are willing to grant leave to the applicants.

[21] In *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191; [2008] 3 CLJ 582 the Court of Appeal opined as follows:

> [11] On the guiding principle for the court to grant leave with a view to commencing action against a company that has been wound up, we would like to refer to the case of *Mosbert Berhad (In Liquidation) v Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 wherein Seah SCJ, in delivering the judgment of the Supreme Court at p 447 had this to say:
>
> > *In re Cuthbert Lead Smelting Co Ltd* [1886] WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an application for leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.
>
> [12] It is clear, based on the above cited case authority, leave to proceed would only be granted when the plaintiff's claim cannot be adequately dealt with in winding up of the defendant's company or when the plaintiff is seeking a remedy which cannot be given in the winding up of the defendant's company.

[22] The approach of the Australia jurisdiction can be seen in the following two cases which dealt with the Australia equivalent of s 226(3) of the Companies Act 1965. In *Vagrand Pty Ltd (in liq) v Fielding CTH* (1993) 11 ACLC 411 where the Federal Court of Australia held as follows:

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The second matter raised by Mr Coles, in his challenge to the order of Morling J, is the standard applied by his Honour in considering the merits of the case demonstrated by the applicants for leave. After referring to a number of authorities on the point, Morling J said at ACLC 175; ALR 317:

> In summary, in the exercise of its discretion under s 371(2) the Court should only grant leave to proceed where it is satisfied that a real dispute exists between the parties and that in light of all the circumstances it is more convenient (or otherwise appropriate) to allow the matter to proceed to judgment.

Mr Coles submits that the test, 'real dispute', imposes too small a burden upon an applicant for leave. The true position, he says, is that an applicant must demonstrate a prima facie case; that is, the applicant must provide evidence of each element of its claim.

There are authorities in which the term 'prima facie case' has been used to describe the case required to be demonstrated by an applicant for leave. But we are not aware of any case in which it has been held that an applicant must adduce evidence of every element of its claim. To impose that burden would be to shut out many meritorious claims. It is commonplace for actions against companies to depend upon documentary evidence. Until there is discovery of relevant documents, it may be impossible for an applicant to prove each element in its case. On occasions, it may also be necessary for the applicant to interrogate the respondent or subpoena other parties. These steps cannot be taken until the action is commenced.

The reason for imposing a requirement of leave, in the case of litigation against companies in liquidation, was explained a century ago by Manning J, of the New South Wales Supreme Court, in *Thomson v Mulgoa Irrigation Co Ltd* (1893) 4 BC (NSW) 33:

> All that s. 140 means is that a company in liquidation is not to be harassed and its assets wasted by unnecessary litigation, and the leave of the Court is therefore required as a safeguard. Before any action can be brought or continued against a company, the Court must investigate the intended litigation.

Manning J did not suggest that it was necessary to prove all the elements of an applicant's claim. In the case before him, he was content that the applicant for leave 'pledge his oath that he has a valid and unimpeachable document'. By the word 'document', he was referring to the mortgage relied on in a foreclosure suit, the validity of which was under challenge. It was sufficient that 'an affidavit of merits' was provided, covering the basic issue in the case.

In *Re Sydney Formworks Pty Ltd (in liquidation)* [1965] NSWR 646 at p 649–650 McLelland CJ in Eq expressed the reason for the requirement of leave in this way:

> This view is in keeping with what I consider to be the obvious intention of the section, namely, to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the Companies Act and that no person will get an advantage to which, under those provisions, he is not properly entitled, and to enable the Court effectively to supervise all claims brought against the company which is being wound up.

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[23] In *Capita Financial Group Ltd v Rothwells Ltd (No 2)* (1989) 7 ACLC 634 where Rogers CJ in Comm D said as follows:

> It is necessary to understand the rationale which buttresses the requirement for showing the existence of a prima facie case. The provisional liquidators and liquidator, respectively, are entitled to be protected from involvement in court proceedings which may be perhaps only of a nuisance nature, or which may be thought to be totally devoid of any substance. The resources of the company in liquidation should not be frittered away in defending baseless claims.
>
> It seems to be that it is considerations of this nature which have led the courts uniformly over the years to demand that there be evidence showing a prima facie case. As Mr Reeves, for the provisional liquidators, pointed out, the requirement goes back to a decision of Manning J in *Thomson v The Mulgoa Irrigation Co Ltd* (1894) 4 NSW Bankruptcy Company and Probate Cases 33. As his Honour pointed out:
>
> > The Court will strain a point to avoid the absurdity of merely requiring the same pleadings to be put on the file again so as to make the matter merely one of costs; but grounds must be shewn on the merits, which would justify the court in granting leave in the first instance. The plaintiff should pledge his oath that he has a valid an unimpeachable document. All that s 140 means is that a company in liquidation is not to be harassed and its assets wasted by unnecessary liquidation and the leave of the court is therefore required as a safeguard. Before any action can be brought or continued against a company, the court must investigate intended litigation.
>
> This approach has been maintained thereafter in successive decisions of courts. (See *Re Sydney Formworks Pty Ltd (in liq)* (1965) NSWR 646 at p 650; *Re AJ Benjamin Ltd (in liq)* (1969) 90 WN (NSW) 107 at p 109; *Re Harry B Harvey Pty Ltd (in liq)* (1971–1973) CLC 40-051; *Ex Parte Walker* (1982) 6 ACLR 423 at p 426; *Ogilvie-Grant & Anor v East* (1983) 1 ACLC 742 at p 744; and *Maclean v Burns Philp Trustee Co Pty Ltd & Ors* (1985) 2 NSWLR 623 at p 646.)
>
> It seems to be that in this Division of the Court, whilst paying due regard to requirements which have been so well established, they should not be carried to the point of absurdity. It is quite clear from the evidence that there is a real dispute between the parties. It seems to be that both the pleadings which have been filed and the conversation between Messrs Still and Singleton, representing the plaintiff and the provisional liquidators, respectively, which has been deposed to, certify that there is a genuine dispute thrown up for decision by the court. In *Re AJ Benjamin Ltd (in liq)* (at p 109), Street J, as he then was, took the view that the absence of evidence could be overcome by imposing a requirement that the applicant file a further affidavit. His Honour did say that he did not wish the action that he there took to be taken as a precedent 'recognising that applicants for leave need not disclose in a prima facie sense the case that they seek leave to bring'.
>
> In this case also, the course that I am intending to follow should not be taken as a precedent; indeed, I deplore that in a situation where the motion had been before the court on a number of occasions, the opportunity had not been taken to attend to what is a long-standing requirement in applications of this nature. However, I

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would be giving effect to form rather than substance if I dismissed the motion by reason of the defect which Mr Reeves has identified.

What I propose to do in relation to this aspect of the matter is to direct that the statements which will be filed by the plaintiff pursuant to the usual order for hearing should be verified on oath, and which will then stand, no doubt, as adequate evidence of a prima facie case. I reserve to the defendant leave to apply to the court for dissolution of the order I propose to make if, contrary to expectation, the evidence filed does not disclose a prima facie case.

[24] From the above authorities, the appellant has the burden of satisfying the court of two criteria:

(a) the appellant's claim cannot be adequately dealt with by the winding up court; and

(b) the appellant has a prima facie case against the respondent.

It is our view that there is little doubt that the appellant's claim of specific performance cannot be dealt with by the winding up court in that its claim is unlike say a proof of debt. In short it is not a monetary claim. In any event, the respondent's submission had not seriously challenged this contention and in our view rightly so.

[25] As for the 'prima facie' element, learned counsel for the respondent forcibly submitted that the appellant's claim is without any merit and bound to fail, hence leave ought not to be given.

[26] The grounds in which learned counsel for the respondent relies on are these:

(a) the appellant's claim is statute barred as it is filed after the six years limitation period provided for under s 6(1)(a) of the Limitation Act 1953. This ground is premised on the contention that the appellant's claim is grounded on contract. Further though this ground is raised by way of preliminary objection, the court is empowered to sustain such objection if it is plain that there is no escape. Learned counsel refer us to *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yacoob & Ors and connected cases* [1983] 2 MLJ 227 at p 231; [1983] CLJ (Rep) 165, at p 167 where the Federal Court held that:

> We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207 where this Court referring to the Court of Appeal decision in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the

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claim would be struck out. An extract from the judgment of Davies LJ at p 939 is relevant.

> In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or would prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.
>
> That indeed was the answer of the learned legal adviser. We agree with him.

(b) the appellant had failed to show the court that the probable success of the claim. The case of *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191; [2008] 3 CLJ 582 was referred to where the Court of Appeal said this:

> The plaintiff's counter claim is based on estimated costs. It is purely a speculative claim which most probably would not succeed. In authorizing proceedings, especially if they may or will involve some drain upon the assets of the company, the court must satisfy itself as to the probable success of the claim or counter claim, (see *Asean Security Paper Mills Sdn Bhd v Provincial Insurance (Malaysia) Sdn Bhd* [2000] 5 MLJ 436; [2000] 1 CLJ 759).
>
> The factual circumstance relied on by the respondent is that the appellant had failed to pay the balance purchase price within the stipulated extended period, hence giving the right to the respondent to lawfully terminate the sales and purchase agreement.

(c) in view of the breach of the fundamental term of not paying the balance of the purchase price by the appellant, it is not entitled to the relief of specific performance as it would be inequitable to grant the same;

(d) there is no evidence to show that the appellant is willing and capable to complete the sales and purchase agreement; and

(e) the respondent had sold 90 lots of land to Merit Shine under a sale and purchase agreement dated 24 December 2007 and this motion is nothing but an attempt to disrupt the liquidator from exercising his duties.

[27] As to what amounts to prima facie in the context of s 226(3) of the Companies Act, in our view is simply whether there is a serious dispute between the litigants which warrant a trial to determine the truth of the combating allegations. It is not unlike the court's approach when dealing with

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an application to strike out under O 18 r 19 of the Rules of Court 2012 despite the consideration that the liquidator ought not to be burden with wasteful financial resources in defending frivolous legal actions. That consideration in our view is also a consideration for other suits not involving wound up companies as all the defendants should also not be burdened with financial resources to defend frivolous legal actions.

[28] From the submission of learned counsel for the appellant, their main complaint is the unilateral imposition of RM100,000 for the extension of time to pay the balance purchase price. This complaint gives rise to the question as to whether the respondent was entitled to impose the RM100,000 contractually or otherwise bearing in mind that the appellant had paid the 10% deposit of RM350,000 together with other expenses (which includes the liquidator and solicitors fees and quit rents) amounting to close to a RM1,000,000.

[29] That question fashioned above in our view is a serious dispute between the appellant and respondent. That question prima facie raises a reasonable cause of action and not to give the appellant the chance to argue that the unilateral imposition of the RM100,000 is unlawful would be contrary to the basic right of the appellant of having its day in court. Not granting leave amounts to shutting put the appellant and it is a drastic action which courts should be slow to use.

[30] Further as mentioned by us earlier, this is a claim not for monetary returns but one of specific performance of an agreement entered pursuant to a settlement agreement mentioned earlier.

[31] As for the contention that the claim is time barred, this is dependent on the question we posed above. If the court finds that the imposition of RM100,000 unlawful, the issue of limitation does not arise. The appellant had related the undisputed fact that there was some delay to the sealing of the court order.

[32] In short, we find that the appellant's claim of specific performance is not frivolous and baseless claim. Neither is it a futile claim in that it is bound to fail. Whether it fails or not should be determined by the courts.

CONCLUSION

[33] For reasons stated above, we allowed the appeal with costs of RM10,000 to the appellant and further ordered that the deposit to be refunded.

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A *Appeal allowed with costs of RM10,000.*

Reported by Kanesh Sundrum

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